Supreme Court of the United States

OCTOBER TERM, 1939

No. 417

FUEL CREDIT CORPORATION, formerly DOBBINS TRINITY COAL COMPANY, INC.,

Petitioner,

against

THOMAS J. HOWARD, owner of the Barge "E. T. HALLORAN",

Respondent,

and

Steam Tug "RUSSELL IV" and RUSSELL TOWING COMPANY,

Respondent Impleaded.

PETITION OF FUEL CREDIT CORPORATION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF

THEODORE L. BAILEY
Proctor for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Fuel Credit Corporation, formerly Dobbins Trinity Coal Company, Inc., prays that a writ of certiorari issue to review an interlocutory decree of the Circuit Court of Appeals for the Second Circuit (R. 162) entered June 13, 1940, reversing a decree in Admiralty of the United States District Court for the Eastern District of New York (R. 119) which dismissed the libel against Dobbins Trinity Coal Company, Inc.

Jurisdiction

The decree of the Circuit Court was entered June 13th, 1940.

Jurisdiction of the Court is provided by Section 347(a) of Title 28 of the United States Code.

Opinions Below

The opinion of the Circuit Court of Appeals was written by Judge Swan with Justices Chase and Patterson concurring, and appears on page 132 of the Record. It is reported at 111 Fed. (2nd) 571.

The opinion of Judge Moscowitz in the District Court appears on page 110 of the Record, and is unreported.

The Questions Presented

1. Where a District Judge in Admiralty has in his discretion accepted as credible the testimony of a witness who testified in open court, and has made his findings of fact based thereon, may the Circuit Court of Appeals disregard such testimony, reverse the District Judge, and substitute its own discretion and findings where the District Court has not clearly erred in a matter of fact, or wrongly applied a principle of law, or been guilty of an abuse of discretion?

2. May the Circuit Court of Appeals in Admiralty assume the power to substitute its own discretion for the discretion of the District Judge who observed the witness testify, where there has been no abuse of discretion by the District Judge because the Circuit Court of Appeals entertains a different view of how the discretion should have been exercised?

3. Has the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

4. Was the Circuit Court correct in saying in its opinion:

> "But really it is immaterial whether the object struck was a submerged rock or a submerged wreck. Whichever it was, the contact and resulting damage occurred during an unexcused sheer which carried the barge close to the shore and into waters which the tug's master never intended her to enter. Evidence establishing such facts is not sufficient, in our opinion, to rebut the presumption of negligence by which the owner made his prima facie case against the charterer."

5. The decision herein being in conflict with the decision of the First Circuit Court of Appeals on the same matter (*Baltimore & Boston Barge Co.* v. *Knickerbocker S. T. Co.*, 170 Fed. 442) should this conflict be resolved by the Supreme Court?

Statement of Facts

The respondent, Thomas J. Howard, owner of the Barge "E. T. Halloran", filed a libel *in personam* against the Dobbins Trinity Coal Company, Inc., a New York corporation, to recover for damages to the Barge, sustained on November 11th, 1938, while under oral day charter to Dobbins Trinity Coal Company, Inc. The damage occurred while the Barge "E. T. Halloran" was being towed by the

Tug "Russell IV" operated by the Russell Towing Company.

The principal issue at the trial was, whether the port bow corner of the Barge came into contact with a submerged, uncharted, movable object at 86th Street East River, New York Harbor, which caused the chock to pull out and the cleat to bend over, resulting in the Barge taking a sudden sheer to port; or, whether due to the negligent navigation of the towing tug, the Barge was caused to sheer at 86th Street East River and finally at 89th Street East River struck a fixed, charted rock, at the bank of the river.

The tug Captain, Olsen, a licensed master, testified that at 86th Street East River the Barge passed a drill boat anchored 100 feet off the New York shore (*fol.* 120) and that the Barge, in tow, passed 75 feet outside the drill boat (*fol.* 140), making a total of 175 feet off the shore; that, although the Barge took a sudden sheer to port, at no time did it come closer than 75 feet from the shore (*fols.* 121, 122, 142 to 145). That the depth of the water was at no time less than 40 feet (*fols.* 136, 139, 171).

The chart (Exhibit 3, R. 104) shows ample depth of water for this Barge which was drawing only 6 or 7 feet (*fol.* 247). The bottom of the Barge sustained no damage whatsoever nor did the lowest plank; the damage commencing upward of two feet or more above the bottom of the Barge (*fols.* 88, 137).

Neither when the Barge came in contact with the submerged object at 86th Street, nor at any subsequent time did the Barge stop (*fols.* 146, 284 and 300) nor strike any fixed object (*fol.* 121).

There is no testimony that the Barge sustained any jolt or jar or any other evidence that the Barge came in contact

with a fixed object. There is no testimony that the Barge came "dangerously near the shore" nor at any time was in shallow water.

After hearing the witness, Olsen, testify in open court, the District Judge remarked:

> "The Court: I accept the testimony of Olsen, Master of the Russell Tug, that he towed the barge in a proper way. No negligence has been established on the part of the Russell" (*fol.* 195).

and in the findings, the District Court found (*fol.* 348)

> "25. That while the said coalboat was in tow of said tug at the time and through the waters in question, she did not strike the bottom, shore, or any charted or known object and that she was at all times navigated in a depth of water far in excess of her draft.
>
> 26. That at the point where the said tow took sheer as aforesaid, there was, at low water, a depth of from 6 to 7 fathoms."

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals, in substituting its own discretion for the discretion of the District Court, and in disregarding the testimony of a witness who had personally testified before and whose testimony was accepted by, the District Court, constitutes the assumption of a supervisory power over matters which should rest solely in the discretion of the District Court. The Circuit Courts of Appeal have heretofore uniformly decided that supervisory powers over such matters rests solely in the discretion of the District Court.

2. The Circuit Court of Appeals for the Second Circuit has based its opinion, alternatively, upon the theory that an unexplained sheer on the part of the towing tug, *ipso facto,* constitutes negligence. This is contrary both to a decision in the First Circuit Court of Appeals and to a previous decision in the Second Circuit and the question should be settled by this Court.

Respectfully submitted

FUEL CREDIT CORPORATION, formerly
Dobbins Trinity Coal Company, Inc.

By THEODORE L. BAILEY
Proctor of Record

New York, September 5, 1940.

IT IS HEREBY CERTIFIED that I have examined the foregoing Petition, that it is not filed for the purpose of delay; that in my opinion the said Petition is well founded and the case should be reviewed by this Court, and that the prayer of the Petitioner for certiorari should be granted.

THEODORE L. BAILEY
Proctor for Petitioner.

Supreme Court of the United States

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Respondent Impleaded.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A reference to jurisdictional provisions, proceedings and opinions below is made in the petition.

The facts in the case are stated in the petition.

A. *The Circuit Court of Appeals may not assume the power of substituting its own discretion for that of the Admiralty Trial Court in accepting the testimony of a witness heard in open court, where there has been no abuse of discretion by the Trial Court.*

The principal issue at the trial was whether the port bow corner of the Barge came in contact with a submerged

uncharted object or struck a charted rock on or near the bank of the East River. The District Court heard the oral testimony of Captain Olsen, the Master of the towing tug, and accepted as credible his testimony that the Barge never came nearer than 75 feet from the shore; and that the depth of the water was at no time less than 40 feet. The chart (Exhibit 3, Record 104) shows ample depth of water for this Barge drawing only 6 or 7 feet. There was no bottom damage to the Barge.

The Trial Court remarked:

> "I accept the testimony of, Olsen, Master of the Russell Tug, that he towed the Barge in a proper way."

and made his findings of fact accordingly.

The Circuit Court of Appeals stated in its opinion:

> "We think it more probable that the Barge struck a rock." (R. 132)

The Circuit Court, in thus substituting its own discretion as to the credibility of the witness, assumed power over matters which rest in the discretion of the District Court.

In *Cary-Davis Tug & Barge Co.* v. *United States,* the Circuit Court of Appeals of the 9th Circuit, 8 Fed. (2nd) 324, said at page 325:

> "In the absence of evidence clearly proving the negligence of the McKinley in the respects alleged in the cross-libel, we cannot set aside the conclusions reached by the District Judge, which heard the testimony."

In *American Merchant Marine Ins. Co.* v. *Liberty Co.* (C. C. A. 3rd Circuit), 282 Fed. 514 at page 518 the Court of Appeals said:

> "Although in an appeal in admiralty we are required to consider the testimony *de novo,* we are called upon to observe the rule that findings of fact by a trial judge who saw and heard the witnesses will have great weight with an Appellate Court and will not be disturbed unless they are clearly against the evidence."

In *Lewis* v. *Jones,* 27 Fed. (2nd) 72, the Circuit Court of Appeals of the 4th Circuit said at page 74:

> "it is unnecessary to cite authority to sustain the proposition that the finding of the trial judge, who had the opportunity of seeing the witnesses, hearing their story, judging their appearance, manner, and credibility, on the question of fact, is entitled to great weight, and will not be set aside unless clearly wrong."

In *Merchant's & Miner's Transp. Co.* v. *Nova Scotia S. S. Corp.,* 40 Fed. (2nd) 167, the Circuit Court of Appeals for the First Circuit said at page 168:

> "His (the trial judge's) conclusions should be adopted by this Court—in which an admiralty case is tried de novo—unless plainly wrong." (Citing cases.)

It was manifestly error for the Circuit Court of Appeals to assume the power to dismiss the findings of fact of the District Court and substitute therefor its own version of the happening based, not upon testimony, but upon certain assumed probabilities.

The Circuit Court premised its rejection of the testimony of Olsen on assumptions which the Court admitted were in some respects only possibilities. It said in its opinion (Record, p. 132):

> "While it is true that the Barge sustained no bottom damage, it is by no means impossible that the port corner of the bow could catch upon the projecting side of a jagged rock without the lowest plank striking."

It is submitted that the assumption of power indulged in by the Circuit Court contrary to the established precedents, calls for an exercise of this Court's power of supervision.

Rule 38, Sec. 5, subd. (6) of the Rules of the Supreme Court of the United States.

B. *The ruling of the Circuit Court of Appeals of the Second Circuit that an unexplained sheer on the part of the towing tug constituted negligence is contrary not only to a decision in the First Circuit but also to prior decisions of the Second Circuit. This question should be settled by this Court.*

As an alternative to its opinion as to probabilities of the happening, the Circuit Court announced as a rule of law the following:

> "But really it is immaterial whether the object struck was a submerged rock or a submerged wreck. Whichever it was, the contact and resulting damage occurred during an unexcused sheer which carried the barge close to the shore and into waters which the tug's master never intended her to enter. Evidence establishing such facts is not sufficient in our opinion to rebut the presumption of negligence by which the owner made his prima facie case against the charterer * * * Here the sheer and the object struck are still unexplained."

In the case of *Baltimore & Boston B. Co.* v. *Knickerbocker Steam T. Co.*, (Circuit Court of Appeals, 1st Circuit) 170 Fed. 442, the Court said at page 442:

> "We are of the opinion that the District Court was justified in finding that according to the preponderance of the testimony the barge * * * took a sudden and unusual sheer to starboard, * * *. The finding of the court that the prime cause of the grounding was a sheer to starboard is supported by the testimony of two witnesses, who testified orally before the District Judge not only directly to the fact but also to various manoeuvers of both tugs which can be accounted for only on the theory of a starboard sheer. * * * For the purposes of this appeal we must, in our opinion, consider as proven the fact that the barge took a sudden and decided sheer to starboard, and that it was necessary for the tugs to maneuver to check this sheer. Our doubt, then, must be confined to the question of the skill and judgment with which these movements of the tugs were made. * * * But upon an issue of this character, where the tugs have accounted for the grounding by the showing of a special emergency, and have definitely described movements, not improbable and not necessarily inconsistent with good seamanship, all presumption of negligence from the mere fact of grounding then disappears, and the burden is cast upon the libelant to establish negligence by a clear preponderance of proof.
>
> "Upon the record as it stands, we are of the opinion that the burden was upon the libelant to show that in checking the starboard sheer of the barge the tugs were handled unskillfully, and that with better handling the barge could have been kept within the limits of the channel. * * *

> "We find ourselves unable to say that there was any inexcusable fault in the handling of the barge by the tugs after the emergency of a sudden sheer in a narrow channel, and upon the whole we agree with the conclusion of the District Judge that the libelant did not sustain its contention that the respondent was at fault."

See also *Algic*, 13 Fed. (Sup.) page 834 at page 838.

In the case of *The Lady Wimett* (District Court, N. D., N. Y.), 92 Fed. 399, the tow took a sudden sheer to starboard, the chock and cleat gave way when the tug attempted to overcome the sheer and the tow struck the pier and sunk. The Court held that there was nothing in such evidence to show that the tug was at fault, stating at page 400:

> "A tug, using ordinary care, is not liable for the sudden sheering of the tow. The Stranger, 1 Brown Adm. 281, Fed. case #13,525."

This case was affirmed by the Circuit Court of Appeals (2nd Circuit) in 99 Fed. 1004 (40 C. C. A. 212).

As in the case of *The Lady Wimett* so in the case at bar, the Barge "E. T. Halloran" took a sudden sheer and the chock and cleat gave way when the tug attempted to overcome the sheer. The Captain, Olsen, testified before the Trial Judge that he made every effort to correct the sheer (*fols.* 142 to 145). However, in the instant case the undisputed testimony showed that the "E. T. Halloran" was pulled out of the sheer before it struck the shore (*fol.* 144). *A fortiori*, the rules laid down by the Courts in the two cases cited, should have been applied by the Circuit Court in this case.

The Court of Appeals has based its reversal upon alternate propositions; First—That the District Court should

not have accepted the testimony of Olsen because of the possibility that he was mistaken. Second,—That, even if the testimony of Olsen were true, the Petitioner should have explained the cause of the sudden sheer in order to absolve itself from negligence. In view of the fact that the barge drew only 7 feet and at no time was in a depth of water of less than 40 feet, the sheer and damage must have been caused by the striking of a submerged uncharted object which, obviously, could not be identified.

The First and the Second Circuits in previous decisions have refused to impose such an onerous burden upon a towing Master. A diligent search of authorities reveals no previous case of a tug captain in charge of the tow being condemned for striking an unknown uncharted, submerged object while in deep water, where the only foundation for a charge of negligence is an unexplained sudden sheer.

There is no distinction in this case between the burden on the tower and the charterer, as it is admitted that the charterer has shown everything it did with the Barge during the period of charter and the damage was definitely localized in time and place. Accordingly, the charterer was only liable if the tow was negligently navigated at such time. (*Hildebrandt* v. *Flower Ltge. Co.*, 277 Fed. 436, affirmed 277 Fed. 438; *The Roslyn*, 93 Fed. (2nd) 278.)

The conflict of law, set up by the reversal of the Circuit Court in this case, should be settled by this Court.

C. *The Prayer of the Petitioner should be granted.*

Dated, September 5, 1940.

Respectfully submitted

THEODORE L. BAILEY
Proctor for Petitioner.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH M. HOWARD,
Proctor for Respondent.

JOHN E. PURDY,
EDMUND F. LAMB,
Counsel for Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This petition is for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

The petitioner, Fuel Credit Corporation (formerly Dobbins Trinity Coal Company, Inc.) seeks to review a decision of that Court which reversed a decision of Honorable GROVER M. MOSCOWITZ of the United States District Court for the Eastern District of New York, and ordered an interlocutory decree on mandate entered on behalf of Thomas J. Howard, as owner of the barge "E. T. Halloran", against the Fuel Credit Corporation for the damages sustained by the said barge while under charter to the petitioner.

POINT I.

The petitioner has totally ignored the issues presented to both the District Court and the Circuit Court of Appeals.

The petitioner attempts to treat this case as if it were one involving an ordinary towage contract and totally ignores the obligations arising *inter parties* because of the admitted charter. Where a vessel is admittedly delivered to a charterer in good condition and is returned damaged, it is the charterer's unquestioned burden to satisfy the Court that that damage has not resulted from any negligence either on the charterer's part or on the part of any one to whom it has entrusted the chartered vessel.

Swenson v. *Snare & Triest Co.*, 160 Fed. 459;
Terry & Tench Co., Inc. v. *Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533;
O'Brien Bros. Inc. v. *City of New York*, 9 F. (2) 542;
Tomkins Cove Stone Co. v. *Bleakley Transportation Co. Inc.*, 40 F. (2) 249;
Rover (*Currie* v. *Atlantic Lighterage Co.*), 1931 A. M. C. 355, affirmed (C. C. A. 2) 1931 A. M. C. 1097 (Not otherwise reported);
Ira S. Bushey & Sons, Inc. v. *W. E. Hedger & Co., Inc.*, 40 F. (2) 417;
O'Boyle v. *United States*, 47 F. (2) 585;
Cummings v. *Pennsylvania R. Co.*, 45 F. (2) 152;
Alpine Forwarding Co. v. *Pennsylvania R. Co.*, 60 F. (2) 734;
White et al. v. *Upper Hudson Stone Co., et al.*, 248 Fed. 893;

Schoonmaker Conners Co. Inc. v. *Lambert, Transp. Co., et al.*, 268 Fed. 102;
Gannon v. *Consolidated Ice Co.*, 91 F. 539 (C. C. A. 2);
Washington Tug & Barge Co. v. *Weyerhauser Timber Co.*, 22 F. (2d) 665 (C. C. A. 9);
The Moran No. 10, 41 F. (2d) 255 (S. D. N. Y.).

This fundamental issue is totally disregarded, although the accuracy of the relation is amply supported by the record. For example, at folio 62, this colloquy occurs:

> "The Court: You are suing the charterer.
> Mr. Lamb: Yes, a deposition has been taken of Captain—
> The Court: Is there any claim about your boat being unseaworthy?
> Mr. Lamb: I do not think so."

* * * * * * * *

and at folio 63:

> "The Court: Do you claim it is unseaworthy?
> Mr. McKernan: The physical condition of the barge?
> The Court: Yes, does anybody claim that?
> Mr. McKernan: No."

and at folio 64:

> "The Court: Do you claim any negligence on the part of Howard?
> Mr. McKernan: I do not claim Howard was negligent."

and at folio 72:

> "The Court: All right, *prima facie* they concede—
> Mr. Lamb: *Prima facie* they concede my case."

Under the facts therefore, an admittedly seaworthy barge has been damaged while under charter without the owner's negligence.

We respectfully refer the Court to an inspection of Dobbins' Exhibit 2, which consists of four photographs, which are to be found at folio 102 of the Record. These photographs are eloquent and incontrovertible proof of the damages sustained.

There could be no clearer case for the application of the presumption of negligence than the present one.

This Court is asked to issue a writ of certiorari because the Circuit Court of Appeals in a very well reasoned opinion decided that not only had the charterer failed to rebut the presumption arising by reason of the admitted relationship of the parties, but also found that there was proof that the "Russell #4", to whom the chartered vessel was admittedly entrusted, was negligent, which necessarily involved liability on the petitioner's part as charterer.

This Court on the petition for certiorari is therefore asked to totally disregard the holding of the Circuit Court of Appeals that the presumption of negligence has not been rebutted, and to consider only what petitioner claims is questionable proof of the negligence of the tug "Russell #4".

The sincerity of this argument can best be evaluated by reference to petitioner's answer, where petitioner in impleading Russell charged the Russell tug with liability for this damage, among other things, in failing to keep her tow under control, in causing and allowing the barge to strike an obstruction while in tow, and in bringing her tow into collision with the bottom (R., fols. 41-42).

The petitioner has thus charged in its pleading that the damage was caused through the very negligence of its agent, "Russell #4," which it is now attempting to dispute.

The difficulty with petitioner's position is just this: if the tug was not negligent, then the petitioner is still liable, for

the only explanation which the petitioner has attempted to offer, to wit, the negligence of the tug, being eliminated, petitioner is still faced with an unrebutted presumption of negligence. In *Tompkins Cove Stone Co.* v. *Bleakley Transportation Co.*, 40 Fed. (2) 249 (C. C. A. 3), the Court wrote at page 251:

> "If, however, the evidence which the charterer offered should not rebut the presumption * * * the presumption of negligence which the law lays against him in the beginning remains as though he had not made an attempt to rebut it, just as though he stood mute facing the presumption."

POINT II.

The statement of the Circuit Court of Appeals that evidence of an unexcused sheer is not sufficient to rebut the presumption of negligence by which the owner made his *prima facie* case against the charterer is not in conflict with its own decisions or the decisions of other circuits.

Judge SWAN, who wrote the opinion for the Circuit Court of Appeals for the Second Circuit, was unable to rationalize the contact shown by the photographs (Dobbins' Exhibit 2), and the verbal testimony that the vessel struck in close proximity with the rock-bound shore line in a position where the barge was never intended to be brought, as being anything but negligent navigation on the part of the tug.

The tug master definitely admitted that the tow sheered (R., fols. 119-120).

In the ordinary course of events, a barge, if properly towed, does not sheer.

The sheer itself is evidence of improper navigation. It was for this reason that Judge SWAN, at page 135, stated:

> "But really it is immaterial whether the object struck was a submerged rock or a submerged wreck. Whichever it was the contact and resulting damage occurred during an unexcused sheer which carried the barge close to the shore and into waters which the tug's master never intended her to enter."

The cases cited by the petitioner in an attempt to show that there is a conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case, and a decision of the Circuit Court of Appeals for the First Circuit, and earlier decisions in the Second Circuit, are not relevant to the physical situation present in the instant case. Here the barge, while under charter, was in tow with other vessels on short hawsers in the wide waters of the East River, New York Harbor (Opinion, R., p. 133, fol. 134). There were no unusual weather conditions and the barge was not steering, but was under the complete domination of the tug. The tug was employed by the charterer.

We have examined the cases cited by the petitioner and do not find them in any way relevant to the situation at bar. These cases all present peculiar factual situations not germane to the situation existing in the present case. None of the cases states any general principle of law in conflict with the decision of the Circuit Court of Appeals in the present case. In none of the cases was a chartered vessel involved, and the action was not against a charterer.

POINT III.

No grounds for certiorari have been shown by the petitioner.

The matter in issue is not of general or widespread importance, involving merely, as it does, a simple case of damage to a chartered barge. The decision of the Circuit Court

of Appeals proceeds upon well settled and long established charter law. No conflict with the charter law of other Circuits, or with any case decided by this Court, has been shown.

The writ prayed for should be denied.

Respectfully submitted,

JOSEPH M. HOWARD,
Proctor for Respondent.

JOHN E. PURDY,
EDMUND F. LAMB,
Counsel for Respondent.